No. 94-1474

In The

Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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United States Court of Appeals for the Ninth Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE OWNERSHIP OF THE BEDS AND BANKS AND ALL WATERS OF ALL NAVIGABLE WATER COURSES WITHIN THE 1873 COEUR D'ALENE RESERVATION BOUNDARY	)
COEUR D'ALENE TRIBE OF IDAHO, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPA, MARGARET JOSE', DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf	)

of all enrolled members of the COEUR D'ALENE TRIBE OF IDAHO, Plaintiffs, vs. STATE OF IDAHO; CECIL D. ANDRUS, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; LARRY ECHOHAWK, ATTORNEY GENERAL; J.D. WILLIAMS, AUDITOR; JERRY EVANS, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES; Defendants.	) CASE NO. CIV91-0437-N-HLR) BRIEF IN SUPPORT OF MOTION TO DISMISS) (13) QUIET TITLE (9) CIVIL RIGHTS) (Filed Nov. 13, 1991)

I. NATURE OF ISSUES PRESENTED

The Coeur d'Alene Tribe[1] claims ownership of all waters and the beds and banks of all navigable waters within the area withdrawn from sale and set apart for the

[1] Although the complaint names as plaintiffs individual tribal members in addition to the Coeur D'Alene Tribe, for purposes of convenience the plaintiffs will be collectively referred to as the Coeur d'Alene Tribe.

Coeur d'Alene Tribe [hereinafter Tribe] by order of President Ulysses S. Grant on November 8, 1873.[2] The Tribe's claims raise serious questions not only of ownership, but of state sovereignty and the division of authority between state, tribal and national governments.

Idaho holds sovereign title to all lands underlying navigable waters[3] within the state. The state's title is based on the equal footing doctrine. This doctrine was described by the Supreme Court in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), as follows:

> The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such lands was

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[2] The area withdrawn by the 1873 Executive Order is shown in Exhibit 1. In 1887, the Tribe entered into an agreement with the United States whereby the Tribe ceded to the United States all lands outside the 1873 withdrawal. In 1889, the Tribe entered into a second agreement with the United States, in which it ceded a large portion of the lands set aside by the 1873 Executive Order. Neither the 1887 nor the 1889 Agreement was ratified until March 3, 1891. *See* 26 Stat. 1027, I Kappler, *Indian Affairs: Laws and Treaties* 419 (2d ed. 1904). Three years later, the Tribe ceded a small portion of the Reservation created by the 1891 statute to allow establishment of the Harrison townsite. *See* 28 Stat. 322, I Kappler 531. The 1873 Executive Order is attached to this memorandum as Exhibit 2, the 1891 statute is attached as Exhibit 3, and the 1894 agreement is attached as Exhibit 4.

[3] Such lands are commonly referred to by various terms, including "beds of navigable waters," "beds and banks of navigable waters," "bedlands," "submerged lands," or "sovereign lands."

> important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. When the 13 Colonies became independent from Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Id. at 196.

Title to the lands under navigable waters vests automatically in the state upon admission to the Union; no congressional action is necessary since the state's title is "conferred . . . by the Constitution itself." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

When the United States acquired the western territories during the nineteenth century, it held the sovereign submerged lands within those territories in trust for the future states. Although Congress had authority under the property clause to convey sovereign lands to private parties prior to statehood, the policy of the United States was to make such conveyances only in the event of "some international duty or public exigency," since such lands are "so strongly identified with the sovereign power of government." *Montana v. United States*, 450 U.S. 544, 552 (1981), quoting *United States v. Holt State Bank*, 270 U.S.

49, 55 (1926). Congressional conveyances must take place prior to the date of statehood, however, because once title is vested in the state it cannot be conveyed to private parties by Congress. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

A court faced with a question of title to the beds of navigable waters must "begin with a strong presumption against conveyance by the United States." *Montana*, 450 U.S. at 552. The presumption can be overcome only if Congress' intention to convey the lands to a private party was "definitely declared or otherwise made plain," was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream." *Id*. The barriers faced by private parties seeking to establish title to submerged lands are so daunting that in a recent review of its equal footing cases, the Court noted that in "only a single case . . . have we concluded that Congress intended to grant sovereign lands to a private party." *Utah Division of State Lands v. United States*, 482 U.S. 193, 198 (1987).

The Coeur d'Alene Tribe's claims that the United States decided to deprive the future State of Idaho of its equal footing entitlement to certain sovereign lands and instead vest ownership of such lands in the Coeur d'Alene Tribe runs counter to the presumption of state ownership under the equal footing doctrine. The Tribe's claims strike at the core of the state's sovereignty. The state has exercised unquestioned jurisdiction over the disputed lands and waters since at least 1927, when the legislature enacted statutes dedicating the waters of Lake Coeur d'Alene and the lands underlying those waters to public use. Idaho Code §§ 67-4304 and 67-4305. Since that

time, thousands of people have established homes and businesses on the shores of Lake Coeur d'Alene, with the expectation that the state would always hold the lake and the lands beneath it in trust for the benefit of the general public. A change in ownership at this late date, more than one hundred years after statehood, would have tremendous implications for the general public, as well as the state.

II. THE ELEVENTH AMENDMENT BARS FEDERAL COURTS FROM HEARING QUIET TITLE ACTIONS OR ISSUING INJUNCTIVE OR OTHER RELIEF AGAINST STATES AND STATE AGENCIES.

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Supreme Court has construed the Amendment to also bar suits brought by a citizen against his own state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

The Eleventh Amendment bars this Court from hearing the Tribe's quiet title claims against the state. The present action is analogous to *Skokomish Indian Tribe v. France*, 269 F.2d 555 (1959), in which an Indian tribe named the State of Washington as a defendant in an action to quiet title to tidelands. The Ninth Circuit ordered the district court to dismiss the action against the state due to Eleventh Amendment immunity. *Id*. at

562-63; *see also Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982) (holding that federal courts do not have jurisdiction to adjudicate a state's interest in property without the state's consent).

The Eleventh Amendment also bars the Tribe from seeking declaratory or injunctive relief against the state. "Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

The immunity from suit granted states by the Eleventh Amendment also extends to state agencies and departments, regardless of the type of relief sought. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Almond Hill School v. United States Dept. of Agriculture*, 768 F.2d 1030, 1034-35 (9th Cir. 1985). It cannot be reasonably disputed that the State Board of Land Commissioners and the Department of Water Resources are agencies or departments of the State of Idaho, since each exercises essential governmental functions. The State Land Board is a constitutional body empowered to direct, control, and dispose of the public lands of the state. Idaho Const. art. 9, § 7. The Department of Water Resources is specifically designated as an "executive department of the state government," Idaho Code § 42-1701, and regulates the appropriation and distribution of the state's waters. *See* Idaho Code title 42, chap. 17; *see also Union Pac. R.R. v. Idaho*, 654 F. Supp. 1236, 1240 (D. Idaho 1987) (Dept. of Water Resources shares State's Eleventh Amendment immunity). Thus, the Tribe's claims against

the State of Idaho, the Idaho State Board of Land Commissioners, and the Department of Water Resources are proscribed by the Eleventh Amendment and must be dismissed.

III. THE TRIBE'S ACTIONS AGAINST THE INDIVIDUAL STATE OFFICERS MUST BE DISMISSED AS BARRED BY THE ELEVENTH AMENDMENT AND FOR FAILURE TO STATE A CLAIM.

1. The Eleventh Amendment strictly limits the actions that may be maintained against state officers.

The Eleventh Amendment bars suits against state officials when sued in their official capacity, since such suits are only another way of pleading an action against the state whom the officer represents. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The only exception is that state officials may be sued for prospective relief, and then only to enjoin unconstitutional actions by state officials. Such actions may proceed because an official acting in violation of the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 160 (1908). Such suits do not violate the Eleventh Amendment because "the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and which does not affect, the state in its sovereign or governmental capacity." *Id.* at 159.

As an exception to the constitutional protections of the Eleventh Amendment, the *Ex parte Young* exception is not broadly applied. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102 (1984). Thus, the mere fact that a suit prays for prospective relief does not automatically avoid Eleventh Amendment limitations: "Simply asking for injunctive relief and not damages *does not* clear the path for a suit." *Ulaleo v. Paty*, 902 F.2d 1395, 1399 (9th Cir. 1990) (emphasis in original). The reviewing court must "look to the substance rather than to the form of the relief sought," and "be guided by the policies underlying the decision in Ex parte Young." *Papasan v. Allain*, 478 U.S. 265, 279 (1986). If examination reveals that "the state is the real, substantial party in interest," or if "the decree would operate against [the state]," the suit must be dismissed. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984), quoting *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945), and *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). This bar applies "regardless of whether [the plaintiff] seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101.

a. Quiet title suits against state officers are barred by the Eleventh Amendment since such actions affect ownership of state property.

The Coeur d'Alene Tribe's quiet title action does not come within the rule of *Ex parte Young* because quiet title suits against state officers directly impact state property and are thus barred by the Eleventh Amendment. In *Aquilar v. Kleppe*, 424 F. Supp. 433, 436-37 (D. Alaska

1976), the United States District Court for Alaska concluded that the Eleventh Amendment barred an action against the Governor and Commissioner of Natural Resources (sued in their official capacities) to quiet a Native Alaskan's claims to lands patented to Alaska by the United States. The court stated:

> Plaintiffs seek to fit this case within the exception to the eleventh amendment that allows suits for prospective injunctive relief under 28 U.S.C. § 1343. The plaintiffs' characterization cannot be accepted. . . .
>
> This suit, if successful, will cause the State to lose land to which it has received patents from the United States. This form of relief is similar to the "equitable restitution" which was specifically found barred by the eleventh amendment in *Edelman v. Jordan*, 415 U.S. 651, 668-69, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The court can find no distinction of significance in the fact that it is land that is involved here rather than money.

Aquilar v. Kleppe, 424 F. Supp. at 436-37.

The *Aquilar* decision was followed in *Red Lake Band of Chippewa Indians v. City of Baudette*, 769 F. Supp. 1069 (D. Minn. 1991), a suit brought, in part, to remove a cloud on title caused by a highway easement held by the State of Minnesota. In deciding a motion to dismiss the tribe's action against the state, the court addressed the issue of whether a quiet title action was more akin to prospective relief to enjoin unconstitutional conduct or retrospective relief. After describing the holding in *Aquilar*, the court stated:

> The Court agrees with the reasoning in *Aquilar*. This case does not fall within the exception for prospective equitable relief set forth in *Edelman* and *Ex parte Young*. Accordingly, the motion of the State of Minnesota to dismiss the case against it will be granted.[4]

769 F. Supp. at 1073.

In the case of *Toledo, Peoria & Western R.R. v. Illinois*, 744 F.2d 1296 (7th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985), the Seventh Circuit Court of Appeals held that a suit against state officials to remove a cloud on title caused by a state highway easement would directly impact the state and was thus barred by the Eleventh Amendment. The court reasoned that:

> [T]he relief here requested by plaintiff ordering the state to release its interest in real property is fundamentally different from the "prospective" relief of *Quern* [*v. Jordan*, 440 U.S. 332 (1979)](ordering state officials to send class members explanatory notice of state administrative procedures) and *Edelman* (ordering state officials to conform their future conduct to federal statutes), and more similar to "retroactive" relief – money damages – barred by *Edelman*."

Toledo, Peoria & Western R.R. v. Illinois, 744 F.2d 1296, 1299 n.1 (7th Cir. 1984).

An analogous line of cases is found in state courts, which overwhelmingly hold that quiet title suits against

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[4] Although the suit was against the state as a named party, the court apparently proceeded upon the assumption that prospective relief was available to the plaintiffs under *Ex parte Young*.

state officers are, in reality, suits against the state and therefore cannot be maintained without the state's consent. *See, e.g., Hjorth Royalty Co. v. Trustees of University*, 30 Wyo. 309, 222 P. 9, 11 (1924); *West Park Shopping Center, Inc. v. Masheter*, 216 N.E.2d 761, 763-64 (Ohio 1966); *American Trust and Savings Bank of Albuquerque v. Scobee*, 29 N.M. 436, 224 P. 788, 790 (1924). Since these cases were decided on the basis of common law sovereign immunity, which is narrower than Eleventh Amendment immunity, *See Aquilar*, 424 F. Supp. at 436, it is clear that the Eleventh Amendment must also bar quiet title actions against state officers.

The arguments for holding that quiet title actions cannot be maintained against state officers are especially compelling when applied to lands held in sovereign ownership by state governments. Claims to submerged lands implicate not only state ownership interests but also the sovereign powers of the state. If this Court sustains the Tribe's quiet title action against the state officers in their official capacities, it would, in effect, be equivalent to allowing the Tribe to proceed against the state in its sovereign capacity, a result prohibited by the Eleventh Amendment.[5]

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[5] Unlike title to submerged lands, which is held in the name of the State of Idaho, Idaho Code § 67-4305, the governor holds the disputed Lake Coeur d'Alene water right. Idaho Code § 67-4304. Nonetheless, any decree voiding or otherwise limiting the water right held by the governor would operate against the state, since the governor holds the right in his official capacity as an agent of the State of Idaho.

b. The Tribe's suit for injunctive relief against state officers is also barred by the Eleventh Amendment because it is functionally equivalent to a suit against the state.

In addition to its quiet title claim, the Coeur d'Alene Tribe seeks injunctive relief against the individual state officers, both individually and in their official capacities. This action must fail for the same reasons that its quiet title claims must fail: the claim does not withstand Eleventh Amendment scrutiny, because the relief sought would directly affect the state in its sovereign capacity, regardless of the capacity in which the officers are sued.

This Court has consistently rejected any suggestion that suits against individual state officers are per se allowable under the Eleventh Amendment, and instead has insisted on determining the practical effect of the requested relief upon the state. *See, e.g., Mazur v. Hymas*, 678 F. Supp. 1473, 1477 (D. Idaho 1987); *Union Pacific R.R. v. Idaho*, 654 F. Supp. 1236, 1240 (D. Idaho 1987). Although the Tribe's suit does not seek damages, as was the case in *Mazur* and *Union Pacific*, the state submits that there is "no distinction of significance in the fact that it is land that is involved here rather than money." *Aquilar v. Kleppe*, 424 F. Supp. 433, 437 (D. Alaska 1976). If the requested relief would have the effect of divesting the state of possession and ownership of property, it cannot be sustained under the Eleventh Amendment.

Examination of the relief requested by the Tribe reveals that it would indeed have a substantial practical effect upon the State of Idaho. The Tribe asks the Court to:

> Preliminarily and permanently enjoin defendants from regulating, permitting or taking any action in violation of the plaintiffs' rights of *exclusive use and occupancy, quiet enjoyment and other ownership interest* in the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary.

Complaint at 9 (emphasis added). If the requested relief were granted, it would effectively oust state officers from possession and control of the state's sovereign property, and would vest the tribal government with exclusive control of the disputed lands and waters.[6] The intrusion upon state sovereignty cannot be questioned, since the state would effectively be enjoined from exercising any physical control over, or reaping any benefit from, the disputed properties.

The fact that injunctive relief, by itself, would not affect the state's legal title to the disputed lands and waters does not avoid the Eleventh Amendment's limitations on the federal judicial power. Control of the beds and banks of navigable waters is an essential attribute of the state's sovereign title to such lands. Indeed, the equal footing doctrine arose from the sovereign's need to control "navigation, fishing, and other commercial activity on rivers and lakes." *Utah Division of State Lands v. United*

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[6] The Tribe's complaint does not allege that regulation by state officers has interfered with the exercise of whatever usufructuary rights individual tribal members may have to the lands and waters within the 1873 Reservation. Instead, the violation alleged by the Tribe is the mere fact that the state deems to regulate the lands and waters in question, demonstrating that the central issue in this action is one of title, not of state violation of individual rights.

States, 482 U.S. 193, 196 (1987). Thus, removal of the state's ability to control such activities by enjoining its officers is tantamount to divesting the state of its sovereign title to the disputed lands and waters. The state could no longer protect or promote its concerns that such lands and waters remain available for all members of the public. The Eleventh Amendment's limitations on federal judicial powers prohibit such infringements upon state sovereign powers.

2. Assuming arguendo that the Tribe's action to quiet title does not violate the Eleventh Amendment, the action cannot be sustained against individual state officers since they hold no title or interest in the disputed properties.

Even if this Court concludes that the Eleventh Amendment does not bar the Tribe's quiet title action against the state officers in their individual and official capacities, the claim must be dismissed for failure to state a claim upon which relief can be granted. Courts faced with quiet title actions against government officers have concluded that such suits cannot be sustained in federal court since the individual officers have no title, claim, or interest in the disputed lands.

In *Chandler v. Dix*, 194 U.S. 590 (1904), the plaintiff sought to remove a cloud on title caused by a state's allegedly unconstitutional sale of plaintiff's lands for violation of tax laws. The state had purchased the lands at the tax sales and was in possession of the lands at the time of suit. The Court upheld dismissal of the case against the state auditor general and county treasurer,

stating: "The auditor general and county treasurer claim no interest in the land, and have none in the question whether the state's title is good. The state's title, so far as it appears, is the only one assailed. The state, therefore, is a necessary party and as this suit cannot be maintained against a state, the bill . . . must be dismissed." *Id.* at 591.

Another example is *Wood v. Phillips*, 50 F.2d 714 (4th Cir. 1931). The plaintiff attempted to bring a quiet title action against a federal forest supervisor on the basis that the supervisor exercised dominion and control over government forest lands. The court held:

> When the bill is considered in the light of the principles governing suits in equity in the federal courts, . . . it is perfectly clear that it cannot be sustained for two reasons: (1) Because a bill to quiet title does not lie in favor of a plaintiff who is not in possession against a defendant who is in possession; and (2) because a suit to quiet title would settle nothing, as defendant is claiming, not in his own right, but as an officer of the federal government, which cannot be made a party.
>
> A federal court of equity will not entertain a bill to quiet title by a plaintiff not in possession against a defendant in possession not only because such plaintiff has a plain, adequate and complete remedy at law in an action of ejectment, but also because defendant has the constitutional right to have the issue of title tried by a jury.
>
> . . . .
>
> And we think that the second ground stated above is equally conclusive against the right of

> plaintiff to maintain the suit in equity. The United States not having consented to be sued, cannot be made a party defendant. . . . Consequently, plaintiff's suit to quiet title will not establish title against the adverse claimant, and any relief which the court may grant will be nugatory.

Id. at 716-17.

The early case of *Sanders v. Saxton*, 182 N.Y. 477, 75 N.E. 529 (N.Y. 1905), summarizes why actions to quiet title cannot be maintained against state officers:

> Now, as the only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void, so that the plaintiff in possession may be forever afterwards free from any danger of the hostile claim, it would seem plain that, where the judgment in an action cannot conclude or bind a party claiming under the adverse title, the action must fail.

Id. at 530.

Since the State of Idaho is an indispensable party to such proceedings and has not consented to the suit, the Tribe's quiet title suit cannot proceed against the state officers alone. Title to the submerged lands is held by the State of Idaho, not the individual officers. *See* Idaho Code § 67-4305. It is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit, and if relief were granted against government officers, it "would amount to nothing." *Appalachian Electric Power Co. v. Smith*, 67 F.2d 451, 456 (4th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934). Thus, any declaration of

title in this action would not be binding upon the State of Idaho, the Idaho State Board of Land Commissioners, or the Idaho Department of Water Resources.[7]

IV. THE TRIBE'S ACTION FOR DECLARATORY JUDGMENT MUST BE DISMISSED SINCE IT IS FUNCTIONALLY EQUIVALENT TO A QUIET TITLE ACTION.

The Tribe's claim for a declaratory judgment regarding its alleged right to exclusively use and occupy waters and submerged lands, and seeking invalidation of state laws affecting those properties, must be dismissed, since it is functionally equivalent to its quiet title claims. The fact that the claim is framed as one for declaratory relief is irrelevant, because the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not create an independent jurisdictional basis for actions in federal court, but merely provides an additional remedy in suits otherwise within the court's jurisdiction. *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1382-83 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Marathon Oil Co. v. United States*, 807 F.2d 759, 763 (9th Cir. 1986), *cert. denied*, 480 U.S. 940 (1987). Thus, the Tribe's action for a declaratory judgment against the State of Idaho, the Idaho State Board of Land Commissioners, the Idaho

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[7] This reasoning also applies to the waters claimed by the Tribe. Although the governor holds the water right for the disputed waters, Idaho Code § 67-4304, they are held in his official capacity as an agent for the State of Idaho and title to such waters cannot be affected by suits against the governor in his individual capacity.

Department of Water Resources, and the state officers named in Tribe's complaint must be dismissed for the same reasons stated in the prior sections of this memorandum.

V. THE PLAINTIFFS' ACTION IS NOT SUSTAINABLE UNDER 42 U.S.C. § 1983.

The Tribe's action under 42 U.S.C. § 1983 is barred by the Eleventh Amendment, for the reasons discussed in the previous sections of this brief. Section 1983 does not abrogate the Eleventh Amendment immunity of the states. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66-67 (1989).

Even assuming *arguendo* that portions of the Tribe's action are not barred by the Eleventh Amendment, the Tribe's action cannot be sustained as a civil rights action under 42 U.S.C. § 1983.[8] Section 1983 authorizes suits to be brought only by a "citizen of the United States or other person." A governmental units suing to enforce rights allegedly held by the governmental unit is not eligible to bring an action under § 1983. *See Buda v. Saxbe*, 406 F. Supp. 399, 403 (E.D. Tenn. 1974) (state cannot bring § 1983

[8] Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

action); *see also White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1987) (Fletcher, J., dissenting) (expressing doubt that a tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under § 1983). Therefore, the Coeur d'Alene Tribe may not maintain an action under § 1983.

The state recognizes that the other plaintiffs named in the Tribe's complaint are persons for purposes of § 1983. The state submits, however, that the plaintiffs have failed to state a cause of action cognizable under § 1983. An examination of the complaint reveals that the plaintiffs plead two causes of action based on two alleged sources of title: aboriginal or Indian title and the 1873 Executive Order. An examination of these two claims reveals that they fall well outside the scope of § 1983.

1. Claims based on aboriginal or Indian title are outside the scope of § 1983.

The first count of the complaint seeks a judgment that the Coeur d'Alene Tribe possessed aboriginal title to the disputed lands and waters and that such title has never been extinguished.[9] This cause of action cannot be sustained, because aboriginal title is not within the scope

[9] Aboriginal or Indian title derives from tribal occupation of homelands since time immemorial. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). It is a right of use and occupancy, as opposed to fee title, which vested in the European nations that "discovered" the American continent. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-84 (1823).

of § 1983, which is limited to claims of "deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . . " In *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-62 (9th Cir. 1989), the Ninth Circuit Court of Appeals stated:

> The district court held that the tribe's right of self-government "preceded, and therefore is not secured by, any federal statute or the Constitution . . . and therefore is not cognizable under section 1983."
>
> . . . .
>
> The tribal right of self-government is not grounded specifically in the Constitution or federal statutes. *See* E. Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L. J. 189, 90-93 "The tribes do not have a constitutional right to maintain this [sovereign] status, nor do they have a constitutional right to exercise any powers or attributes of sovereignty." *Id.* at 135. Instead, the right to tribal self-government is protected by treaty and federal judicial decisions. *Id.* at 91-93. "[T]he Constitution does not require continuing recognition of tribes as governmental entities [and] the treaty clause has come to be the source of federal legislative power over Indian affairs." *Id.* at 93. . . .

Id. at 661-62, *cert. denied*, 110 S. Ct. 1523, 108 L.Ed.2d 763 (1990).

Like the tribal right of self government, any aboriginal title the Coeur d'Alene Tribe may possess preexisted the formation of the federal government and is not dependent upon statute or formal governmental action. *See Cramer v. United States*, 261 U.S. 219, 229 (1923). Thus,

the Tribe's claims of aboriginal title are not "secured by the Constitution or laws" and fall outside the express scope of § 1983.

2. Claims based on Executive Orders are outside the scope of § 1983.

The second count of the Tribe's complaint seeks a judgment that the United States reserved or conveyed the disputed lands and waters to the Coeur d'Alene Tribe. This cause of action is based primarily on the 1873 Executive Order. The term "laws," however, as used in § 1983, has been extended only to statutory laws. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 S. Ct. 444, 448, 107 L.Ed.2d. 420, 427 (1989). Executive orders are not "laws" and cannot affect or confer rights and obligations, since the power to do so is vested only in the Congress. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-04 (1979). Indeed, rights alleged under Executive Orders are not judicially-enforceable unless the Order was "issued pursuant to a statutory mandate or delegation of authority from Congress." *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 679 (D. N.M. 1980), quoting *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975). *See also Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 501 (D. Kansas 1978).

Moreover, it is well-established that an Executive Order establishing an Indian reservation creates no right of use or occupancy to the beneficiaries beyond the pleasure of Congress and the President. *Healing v. Jones*, 210 F. Supp. 125, 138 (D. Az. 1962), *aff'd per curiam*, 373 U.S. 758 (1963). Equitable title or other justiciable property rights

do not "vest" in the Tribe until such time as Congress conveys such rights to the Tribe through statute or ratification of treaty or agreement. *Healing v. Jones*, 174 F. Supp. 211, 216 (D. Az. 1959). Thus, tribal property claims based on Executive Orders are not "amenable to judicial determination." *Id*. Since the 1873 Executive Order was issued under the president's inherent authority, claims based on it are not within the scope of § 1983.

3. The complaint fails to plead the existence of any statutory rights, privileges, or immunities within the scope of § 1983.

The Tribe's claims to the disputed lands and waters are based on aboriginal title and the 1873 Executive Order. The Tribe does not allege that 1887 Agreement, the 1889 Agreement, or the 1891 act ratifying the agreements reserved or conveyed the disputed lands and waters to the Tribe.[10] The only claims alleged to be secured by the agreements or the 1891 act are the following: in paragraph 20 of its complaint, the Tribe alleges that the 1887 Agreement provides that the "area within the Reservation was to be held for the Coeur d'Alenes and other Indians and used by others only with the consent of the Indians

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[10] The Tribe has good reason not to claim that the ratifying act conveyed title of submerged lands to the Tribe. The ratifying act was not enacted until March 3, 1891, eight months after the State of Idaho was admitted into the Union and acquired sovereign ownership of the beds and banks of all navigable waterways within its boundaries. It is well-established that Congress cannot convey submerged lands to private parties after the date of statehood. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

on the Reservation;" in paragraph 21, it alleges that the cession agreement in the 1889 Agreement "did not cede any of the beds, banks or waters at issue herein." Such statutory claims are not cognizable under § 1983.

The Supreme Court has limited § 1983 remedies to statutes intended to create enforceable "rights, privileges or immunities" within the meaning of § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 19 (1981). Accordingly, the Ninth Circuit Court of Appeals has, in several cases, examined whether suits brought by Indian tribes seeking interpretation of treaties and agreements come within the scope of § 1983. It has consistently concluded that they do not.

The primary case is *United States v. Washington*, 813 F.2d 1020 (9th Cir. 1987). There, the court was faced with the issue of whether a suit seeking interpretation of fish-sharing provisions in the tribe's treaty was within the scope of § 1983. The issue arose after the tribe had prevailed in its writ of certiorari to the Supreme Court by proving the existence of such rights, and was therefore seeking attorney fees under 42 U.S.C. § 1988. The court stated:

> The dispositive question in this appeal is whether the Tribes have stated a claim under 42 U.S.C. § 1983 for which attorney's fees are available under 42 U.S.C. § 1988. This is answered by examining the character of the principal question that came before the Supreme Court in [*Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979)].

There is no doubt that the Supreme Court considered the principal question to be the *'character of th[e] treaty right* to take fish.' *Fishing Vessel*, 443 U.S. at 662, 99 S.Ct. at 3062 (emphasis added). Indeed, the Supreme Court noted that the litigation commenced when the United States brought suit against Washington seeking an *"interpretation of the treaties"* and an injunction. *Id.* at 670, 99 S.Ct. at 3066 (emphasis added).

. . . .

It is apparent that throughout the opinion the Supreme Court was making a determination of what exact rights each party had to the fish. As the Court stated, it granted certiorari "to interpret this important treaty provision." *Id.* at 674, 99 S.Ct. at 3068. There was no discussion of the state violating the Indians' rights under the treaty or under the Fourteenth Amendment. It is not disputed that the Indians had rights under the treaty. Just exactly what those rights were was unknown until the Supreme Court decision. If the State of Washington violates those now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a § 1983 action. That, however, has not yet happened and is not the situation here.

> We therefore hold that the Tribe's *treaty interpretation claims do not give rise to a claim cognizable under § 1983.*

United States v. Washington, 813 F.2d at 1022-23 (citations and footnotes omitted) (underlined emphasis added); *See also Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 663 (9th Cir. 1989) (§ 1983 does not apply to rights "grounded in

treaties, as opposed to specific federal statutes or the Constitution").

In another case, *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984), the Ninth Circuit refused to extend § 1983 to cases where the issue is the division of sovereign powers between state, tribal, and national governments. Since the central issue in the suit was whether an Indian tribe was exempt from state taxation, the court held that the suit "does not implicate individual rights; rather the exemption derives from [the Tribe's] status as a sovereign." *Id.* at 851. The court concluded that since § 1983 is intended to protect *individual* rights, cases which revolve around divisions of governmental authority are not within its scope. *Id.*

The court reiterated its reasoning in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989):

> Like the right to be free from state taxes preempted by federal law, the right to self-government is best characterized as a power, rather than a right. It enables a tribe to exercise powers as a sovereign. . . . Because the right to tribal government protects the powers conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983.

Id. at 662. Thus, as a general rule, suits seeking to protect the exercise of tribal governmental powers cannot be brought under § 1983.

Based on the above cases, it is clear that the Coeur d'Alene Tribe's present action cannot be sustained under § 1983. To the extent the Tribe's claims are based on the 1887 and 1889 Agreements, the central issue will be one

of interpretation, not of protection of individual rights. Furthermore, the central issue in this case is whether the United States passed sovereign properties to the state, as presumed under the equal footing doctrine, or whether it conveyed the properties to the Tribe prior to statehood. The question is one of a division of sovereign authority and ownership between governmental bodies, not one of individual rights. Finally, even assuming for purposes of argument that the Tribe owns the disputed lands and waters, it owns them as a governmental entity; the members of the Tribe cannot assert individual rights of ownership to the lands and waters. Thus, since the suit seeks to protect rights "conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989).

VI. CONCLUSION

For the reasons stated in this memorandum, the defendants submit that the Coeur d'Alene Tribe's action against the State of Idaho, the State Board of Land Commissioners, and the Idaho Department of Water Resources must be dismissed as barred by the Eleventh Amendment, and for failure to state a claim under 42 U.S.C. § 1983. The defendants additionally submit that the Tribe's action against Governor Cecil D. Andrus, Secretary of State Pete Cenarrusa, Attorney General Larry EchoHawk, State Auditor J.D. Williams, Superintendent of Public Instruction Jerry Evans, and Department of Water Resources Director Keith Higginson must be dismissed as barred by the Eleventh Amendment, for failure to state a quiet title claim against the individual officers, and for failure to state a claim under 42 U.S.C. § 1983.

Respectfully submitted this 13th day of November, 1991.

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of November, 1991, I caused to be served a true and correct copy of the foregoing MOTION TO DISMISS and BRIEF IN SUPPORT OF MOTION TO DISMISS to be:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE OWNERSHIP OF THE BEDS AND BANKS AND ALL WATERS OF ALL NAVIGABLE WATER COURSES WITHIN THE 1873 COEUR D'ALENE RESERVATION BOUNDARY	Case No. CIV91-0437-N-HLR
COEUR D'ALENE TRIBE OF IDAHO, et al., Plaintiffs, vs. STATE OF IDAHO, et al., Defendants.	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

The Coeur d'Alene Tribe (Tribe) asserts that this action is essentially a "border dispute" between two sovereigns, and that this Court must give special consideration to the Tribe's claims because of its sovereign status. Controlling authorities do not support such assertions.

Indian tribes are quasi-sovereign entities with certain rights of self-government and control of internal affairs, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. ___, 109 S. Ct. 2994, 3005, 106 L.Ed.2d 343, 360 (1989) (plurality op). The unique status of Indian tribes within our federal system, however, does not change the underlying presumption in favor of state ownership of submerged lands. The test for determining whether the United States conveyed submerged lands to an Indian tribe is the same as the test used to determine whether submerged lands were conveyed to a private party. *Compare Montana v. United States*, 450 U.S. at 551-554, with *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894). No special consideration is given to tribes claiming ownership of submerged lands.

Moreover, the state's sovereign title to submerged lands is not affected by the location of such lands within the borders of an Indian reservation. Regardless of whether the submerged lands are located inside or outside a reservation, ownership of such lands is presumed to be in the state. *See Montana v. United States*, 450 U.S. 544, 554 (1981). Analysis of the state's motion to dismiss must take place in light of this presumption of state ownership.

The Tribe warns that failure to hear this "border dispute" in federal court would be "an ominous departure for our system of ordered liberty." Tribe's Brief at 2. Territorial disputes between governments, however, are often found to be outside the jurisdiction of federal courts. A prime example is *Block v. North Dakota*, 461 U.S. 273 (1983), in which North Dakota attempted to sue the United States to quiet title to a disputed riverbed. The Supreme Court held that the state's claim was barred by the doctrine of sovereign immunity, despite the fact that the state's only remedy would be to continue to assert its title "in hope of inducing the United States to file its own quiet title suit. . . . " *Id.* at 291-92. Thus, this Court is not obligated to provide the Tribe a forum for its claims. Moreover, the Tribe has other remedies. For example, the Tribe has already indicated that the United States may file suit on its behalf. Further, as noted by the Tribe, the state is subject to quiet title suits in state courts.

A. THE ELEVENTH AMENDMENT BARS ALL SUITS AGAINST STATES AND STATE AGENCIES, REGARDLESS OF THE RELIEF SOUGHT.

The Eleventh Amendment is a key component of the notion of federalism. It stands for the proposition that a state may not be sued in a federal court without its consent. The basic requirements of the Eleventh Amendment are fairly simple:

> A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity. If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action.

Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982).

This Eleventh Amendment applies equally to suits brought by private plaintiffs and Indian tribes. In *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991), the Ninth Circuit Court of Appeals did not recognize any special standing of Indian tribes to seek prospective relief directly against states. The court held only that the village could obtain injunctive relief against the Commissioner of the Department of Health and Social Services. *Id.* at 552. In so holding, the court did treat the tribe any differently than a private plaintiff; the court simply applied the rule of *Ex parte Young*, 209 U.S. 123 (1908), which allows prospective injunctive relief against state officials. As discussed *infra*, prospective relief against state officials is not available in this case because it would operate directly against the state's sovereign interests in submerged lands.

The Tribe, however, goes further, and asserts that the court in *Venetie* authorized tribes to seek direct injunctive relief against states. It relies on the Ninth Circuit's statement that the district court should "provide the relief necessary to ensure that the State of Alaska affords full faith and credit to adoption decrees issued by the Tribal courts." 944 F.2d at 562. This statement, however, should not be construed as authorizing direct injunctive relief against states. It is unlikely that the court would make such a radical change in Eleventh Amendment jurisprudence in an offhand manner, with neither analysis nor

explanation. A fairer reading of the Ninth Circuit's statement is simply that injunctive relief against state officials available under *Ex parte Young* would operate indirectly against the State of Alaska.

B. THE STATE HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY TO QUIET TITLE ACTIONS.

The Tribe argues at length that within Idaho state courts, quiet title actions are *in rem* and may be maintained against the State. Such argument is completely irrelevant to the question before the court. The fact that a state has waived its immunity within its own courts is "not determinative of whether [a state] has relinquished its Eleventh Amendment immunity from suit in federal courts." *Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974); *Chandler v. Dix*, 194 U.S. 590, 591-92 (1904). In order for a state to waive its Eleventh Amendment immunity, it must "give an 'unequivocal indication' that it consents to be sued in federal court." *Collins v. Alaska*, 823 F.2d 329, 331 (9th Cir. 1987), quoting *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987). Such an indication may be found where:

> (1) the state expressly consents; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity.

Collins, 823 F.2d at 331-332. Moreover, the waiver "must extend explicitly to suits in federal court." *Leer v. Murphy*, 844 F.2d 628, 632 (9th Cir. 1988).

None of the state court decisions cited by the Tribe address the Eleventh Amendment. They only address the state's common law immunity. Nor do the cases say anything about suits in federal court. Under such circumstances, the state court decisions are not sufficient to waive the state's Eleventh Amendment immunity. *See Leer v. Murphy*, 844 F.2d at 632 (Idaho Supreme Court decision finding waiver of state's sovereign immunity "does not provide the requisite express language to indicate that Idaho has waived its eleventh amendment immunity").[1]

Nor does the nature of a case as *in rem* or *in personam* affect the state's Eleventh Amendment immunity:

> The fact that a suit in a federal court is *in rem* or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State. . . . [W]hen the State . . . withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

Missouri v. Fiske, 290 U.S. 18, 28 (1933).

A different outcome is not required merely because a quiet title suit is brought by an Indian tribe. The Tribe suggests that *Aquilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska

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[1] *See also Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959). Contrary to the Tribe's assertions, the outcome in *Skokomish* was not determined by whether Washington possesses the right to assert *in personam* immunity in quiet title actions. In fact, the court noted that Washington, like Idaho, would be amenable to the suit if it were brought in a state court, but held that consent to be sued in state court is not sufficient to waive Eleventh Amendment immunity. *Id.* at 562.

1976), which barred a tribal native's quiet title action against a state, would have been decided differently if the tribe, instead of an individual, had filed the quiet title action. The Tribe cites dicta that in such circumstances the Eleventh Amendment "would be overcome." 424 F. Supp. at 437. The dicta in *Kleppe*, however, is based on language in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 1634 (1976), which was interpreted, at that time, as allowing Indian tribes to step into the shoes of the federal government and sue states in federal court. This interpretation of *Moe* was soundly rejected by the Supreme Court in *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2584, 115 L.Ed.2d 686, 697 (1991).

C. THE PROSPECTIVE RELIEF REQUESTED AGAINST STATE OFFICERS MUST BE ANALYZED TO DETERMINE ITS PRACTICAL EFFECT ON THE STATE'S SOVEREIGN INTERESTS.

It is beyond question that the Tribe's action to quiet title cannot be maintained against the state officers named in the Tribe's complaint. The complaint does not allege that the officers personally claim title to the disputed submerged lands. The only cloud on the Tribe's alleged property interest is the state's claim of ownership. Thus, this court could grant the Tribe's requested quiet title relief only by reaching the question of the state's title. Such quiet title claims by Indian tribes against state officers are barred by the Eleventh Amendment. *Manypenny v. United States*, 15 Ind. Law Rptr. 3024, 3029 (D. Minn. 1988), *aff'd*, 948 F.2d 1057 (8th Cir. 1991).

Therefore, the only claim remaining against the individual state officers is the Tribe's claim to enjoin the officers from possessing and managing the disputed submerged lands. As a general rule, plaintiffs may seek prospective injunctive relief against state officers. *Mazur v. Hymas*, 678 F. Supp. 1473, 1476 (D. Idaho 1988). This Court, however, has recognized the need to analyze relief requested against state officers in order to determine its practical effect on the state. *Id*. Such an analysis is especially necessary in the context of a suit to quiet title to, or gain possession of, submerged lands. Because of the unique status and properties of submerged lands, ejectment of state officers from possession of submerged lands would have tremendous practical effects upon the state and its sovereign rights.

Submerged lands are "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Kootenai Environmental Alliance, Inc., v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983), quoting *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

This "public trust" is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id*. at 631, 671 P.2d at 1094, quoting *National Audubon Society v. Superior Court of Alpine County*, 189 Cal. Rptr. 346, 360-61, 658 P.2d 709, 723-724 (1983).

The public trust distinguishes submerged lands from other lands held for public purposes. *Id.* In order to fulfill public trust requirements, states must actively manage submerged lands to prevent unauthorized encroachments and protect public values. Because active management and protection of submerged lands is an integral component of sovereign ownership, ejectment of state officials from possession would be tantamount to denying the state the ability to fulfill its public trust duties.

For these reasons, the Tribe's present action must be distinguished from the ejectment actions against state officers relied upon by the Tribe. In each of those cases, the state officers had taken possession of property previously in custody of the plaintiff and asserted ownership on behalf of the state. For example, in *United States v. Lee*, 106 U.S. 196 (1882), the United States bought the plaintiff's property at an allegedly defective tax sale. In *Tindal v. Wesley*, 167 U.S. 205 (1897), the state sold the plaintiff a piece of real property, than repossessed it for a defect in payment. Finally, in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), the state officers retained possession of artifacts from an abandoned shipwreck even after it was discovered that the wreck was not on state lands. The Court stated that the officers did not have even a "colorable claim" to the artifacts. *Id.* at 694.

In contrast, the Tribe's present action seeks property which, under the United States Constitution, passed to the State at statehood in 1890 for the benefit of all state citizens. So far as the state has been able to determine, the Tribe did not dispute the state's ownership of the submerged lands until sometime after 1972, when it asserted ownership as part of proceedings before the Federal

Energy Regulatory Commission (FERC) to license hydropower facilities owned by the Washington Water Power Co. *See* 13 FERC ¶ 63,051 (1980).

Given the long history of state ownership and possession, and the Tribe's apparent acquiescence to the state's ownership, the constitutional concerns present in *Lee*, *Tindal*, and *Treasure Salvors* are not present here. Those ejectment actions were allowed to proceed against state officers because any other result would allow a state, through its officers, to seize property without making compensation to the owner, thus violating constitutional prohibitions against the taking of property. *See Treasure Salvors*, 458 U.S. at 687 n. 22; *see also Malone v. Bowdon*, 369 U.S. 643, 648 (1962) (limiting *United States v. Lee* by holding that ejectment actions against government officers are valid only where there is a claim of an unconstitutional taking of property without compensation). In this case, however, there are no concerns of an unconstitutional taking, since submerged lands are presumed, under the United States constitution, to belong to the state. *See State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (state's title to submerged lands conferred by "the Constitution itself"). Far from unlawfully seizing property, the state's officers are acting in accordance with the state's presumed ownership.

Thus, the Tribe's claims are not analogous to the cases upholding ejectment actions against state officers. The Tribe seeks to divest the state of its longstanding ownership of submerged lands, an ownership which the Tribe did not directly challenge until the filing of this action, over 100 years after statehood. The practical effect of allowing the Tribe to proceed against the named state

officers is to allow the Tribe to proceed directly against the state's sovereign interests. Such actions are barred by the Eleventh Amendment.

D. THE RIGHTS CLAIMED BY PLAINTIFFS ARE NOT WITHIN THE SCOPE OF 42 U.S.C. § 1983.

The state submits that it is unnecessary to reach the issue of whether the plaintiffs' action can be sustained under 42 U.S.C. § 1983, because the actions of both the Tribe and the individual tribal members are barred by the Eleventh Amendment. Section 1983 does not abrogate the Eleventh Amendment immunity of the states. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66-67 (1989). If, however, this Court finds that some portion of the plaintiffs' claims are not barred by the Eleventh Amendment, the claims still fail because they are not within the scope of § 1983.

The plaintiffs concede that the **Tribe's** claims are not within the scope of § 1983. Tribe's Brief at 14. As discussed in the state's original brief, the claims of the individual plaintiffs are also outside the scope of § 1983. The plaintiffs so much as admit that their claims are not individual rights when they state on page 2 of their brief that "[t]his matter is essentially a border dispute between two sovereigns." Furthermore, the face of the plaintiffs' complaint fails to identify any constitutional provisions or statutes securing rights to the individual tribal plaintiffs. The executive order and statutes cited by the plaintiffs are alleged only to secure rights to the Coeur d'Alene Tribe.

The plaintiffs try to rectify this error by citing two statutes which supposedly secure property rights to the individual plaintiffs. The first, 8 U.S.C. § 1401, provides that the granting of federal citizenship to tribal members does "not in any manner impair or otherwise affect the right of such person to tribal or other property." This statute, however, does nothing to secure the rights asserted in this case. It merely provides that the citizenship granted to Native Americans in 1924 would not affect whatever rights individual tribal members may have enjoyed prior to gaining citizenship.

The second statute cited by the plaintiffs is the Nonintercourse Act of 1790, 25 U.S.C. § 177, which provides that conveyances of lands from tribes or tribal members are invalid unless approved by the United States. The purpose of 25 U.S.C. § 177 is to "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress. . . . " *Federal Power Comm'n v. Tuscorora Indian Nation*, 362 U.S. 99, 119 (1960). The statute does not secure any property rights to individual tribal members, but merely voids attempted conveyances of tribal property to private individuals. In fact, "individual Indians do not even have standing to contest a transfer of tribal lands on the ground that the transfer violated [the Nonintercourse Act]." *United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989); *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). It is axiomatic that since the individual tribal members lack standing to invoke the Nonintercourse Act, they have no claim that the Act secures rights to them for purposes of § 1983.

Canadian St. Regis Band of Mohawk Indians v. New York, 573 F. Supp. 1530, 1537 (N.D. N.Y. 1983).

Justice Rehnquist's concurring opinion in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), is not to the contrary. In *Oneida*, the suit claiming violation of the Nonintercourse Act was brought by the Tribe, not by individual tribal members. The issue before the Court was whether the Tribe's claims presented a federal question justiciable under 28 U.S.C. §§ 1331 and 1362. As Justice Rehnquist noted, the Tribe's complaint was basically one in ejectment, alleging that the defendants were in wrongful possession of the Tribe's property because the Tribe's previous conveyance of those lands to the state was in violation of the Nonintercourse Act. 414 U.S. at 683. Thus, Justice Rehnquist concluded that a federal question existed because the Tribe's claim, as pleaded, arose under the Nonintercourse Act. Justice Rehnquist did **not** state that the Nonintercourse Act is a general guarantee of tribal property rights in every case where a Tribe or its members alleges an interest in property.

In addition to 8 U.S.C. § 1401 and 25 U.S.C. § 177, the plaintiffs allege that 26 Stat. 1027, ratifying the 1887 and 1889 Agreements between the Coeur d'Alene Tribe and the United States, secures rights to the individual plaintiffs "which truly form the basis of this suit." The plaintiff's complaint, however, belies this assertion. The plaintiffs trace their alleged interests in the submerged lands to aboriginal title and the 1873 Executive Order. Complaint, ¶¶ 19 and 23. The 1887 Agreement is alleged only to provide that the Coeur d'Alene Reservation "was to be held for the Coeur d'Alenes and other Indians."

Complaint, ¶ 20. As discussed *supra*, the mere creation of an Indian reservation is irrelevant to the question of state ownership of submerged lands. *See Montana v. United States*, 450 U.S. 544, 554 (1981). The 1889 Agreement is alleged only to not affect or cede the Tribe's alleged rights in the submerged lands. Complaint, ¶ 21. Such an allegation is not sufficient to state a claim under 42 U.S.C. § 1983 that the plaintiffs seek to protect rights "secured" to them by federal statute.

Moreover, it is clear that in order to grant the plaintiffs relief under the Agreements of 1887 and 1889, the Court would have to interpret the language and intent of the Agreements. Suits in which the requested relief is dependent upon interpretation of tribal treaties or agreements are not within the scope of § 1983. *United States v. Washington*, 813 F.2d 1020, 1022-23 (9th Cir. 1987); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 663 (9th Cir. 1989). An actual conflict between state and federal law which might give rise to a § 1983 action cannot occur until such time as the tribe's rights under the treaty or agreement are definitely ascertained through judicial interpretation. *United States v. Washington*, 813 F.2d at 1023.

CONCLUSION

For the reasons stated in this brief and the state's original brief, the plaintiffs' claims must be dismissed as required by the Eleventh Amendment of the United States Constitution.

Respectfully submitted this 6th day of March, 1992.

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I hereby certify that on the 6th day of March, 1992, I caused to be served a true and correct copy of the foregoing Reply Brief In Support of Motion to Dismiss by U.S. Mail, postage prepaid, and addressed to:

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